



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

JUN 26 2013

Mr. Jim Rexroad
Vice President
Avenal Power Center, LLC
500 Dallas Street, Level 31
Houston, Texas 77002

Dear Mr. Rexroad:

Thank you for your letter to Gina McCarthy dated December 19, 2012, in which Avenal Power Center, LLC (APC) requested that the U.S. Environmental Protection Agency (EPA) provide an 18-month extension of the deadline for commencing construction under the Prevention of Significant Deterioration (PSD) permit for the Avenal Energy Project (AEP), pursuant to 40 CFR 52.21(r)(2). In a letter dated February 15, 2013, you provided more detailed information concerning the basis for your request, including the reasons why APC has been unable to commence construction on the AEP and why APC believes that an 18-month extension is necessary.

As you mentioned in your letters, the PSD permit that EPA issued for the AEP became effective and final on August 18, 2011, and the PSD regulations at 40 CFR 52.21(r)(2) provide that approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. 40 CFR 52.21(r)(2) further provides that EPA may extend the 18-month period upon a satisfactory showing that an extension is justified. APC submitted its request for an extension of the final PSD permit's deadline for commencing construction for the AEP with its proposed justification prior to February 18, 2013, *i.e.*, 18 months after August 18, 2011, the date on which APC received a final PSD permit and approval to construct the AEP.

APC's letters explained that it has been unable to commence construction of the AEP due to uncertainty resulting from the litigation challenging EPA's PSD permit decision for the AEP that is pending before the Ninth Circuit Court of Appeals. You provided information concerning the procedural background involved with this permit decision, including EPA's decision to grandfather the permit application for the AEP from demonstrating compliance with new PSD requirements that became applicable more than one year after the PSD permit application was determined to be complete. You explained that although the petitions for review were filed with the Ninth Circuit Court of Appeals by November 2011, and the case had been fully briefed by May 2012, the Court has not yet issued a decision in the case, which includes a challenge to EPA's decision to grandfather the PSD permit for the AEP, and oral argument before the Court has not yet been scheduled. While APC is not precluded from commencing construction by the litigation *per se*, your letters explained that APC cannot enter into either a continuous, physical onsite construction program or an irrevocable contract for such a program due to financial, contractual, design, and other constraints associated with the uncertainty resulting from the ongoing litigation. You also stated that APC would be unable to commence construction immediately upon a favorable decision from the Court in the challenge to EPA's PSD permit decision for the AEP.

and described numerous actions that would be necessary to complete prior to commencement of construction after the Court issues such a ruling.

We have considered the information you provided to support your extension request, as well as the larger context of EPA's grandfathering decision and the associated litigation before the Ninth Circuit Court of Appeals and significant uncertainty regarding the PSD permit's effectiveness and specific requirements, in light of the challenge to the grandfathering decision. After careful consideration, we have determined that a satisfactory showing has been made to justify an 18-month extension of the final PSD permit's deadline for commencing construction. Therefore, the deadline for commencing construction under the PSD permit for the AEP is hereby extended by 18 months, until August 18, 2014. Accordingly, to incorporate this change, this document administratively amends Condition I.A of the PSD permit issued to APC for the AEP as follows:

I. PERMIT EXPIRATION

As provided in 40 CFR § 52.21(r), this PSD Permit shall become invalid if construction:

A. is not commenced (as defined in 40 CFR § 52.21(b)(9)) within 36 months after the approval takes effect; or ...

Please note that all of the other conditions of the PSD permit, including Conditions I.B and I.C, are unchanged, and remain in place and effective as written.

We have enclosed a copy of a document providing a more detailed discussion of the background and analysis for EPA's decision. Please do not hesitate to contact Gerardo Rios, Chief of the Region 9 Air Permits Office, at (415) 972-3974, if you have any questions concerning this response.

Sincerely,



Deborah Jordan
Director, Air Division

Enclosure

cc (w/encl.): David Warner, SJVUAPCD
Michael Tollstrup, CARB